

1996

Hub Cap Annie, INC., Plaintiff and Appellee, vs.
Don C. Jensen and Wheel Cover Marketing, INC.,
Defendant/Appellee : Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS

DOCKET

MENT

CKET NO. 960592-CA

IN THE COURT OF APPEALS

FOR THE STATE OF UTAH

HUB CAP ANNIE, INC.,

Plaintiff and Appellee,

vs.

DON C. JENSEN and WHEEL
COVER MARKETING, INC.

Defendant/Appellee.

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Case No. 960592-CA

ORAL ARGUMENT REQUESTED

Priority No. 15

BRIEF OF APPELLEE

Appeal from Judgment Denying Sanctions and Costs
Against Plaintiff and Plaintiff's Attorney
Third Judicial District Court
Salt Lake County, State of Utah
The Honorable Sandra N. Peuler, Presiding

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FOR THE STATE OF UTAH**

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IN THE COURT OF APPEALS
FOR THE STATE OF UTAH

HUB CAP ANNIE, INC.,	:	
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Plaintiff and Appellee,	:	Case No. 960592-CA
vs.	:	
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DON C. JENSEN and WHEEL	:	
COVER MARKETING, INC.	:	
	:	
Defendant/Appellee.	:	

BRIEF OF APPELLEE

Appeal from Judgment Denying Sanctions and Costs
Against Plaintiff and Plaintiff's Attorney
Third Judicial District Court
Salt Lake County, State of Utah
The Honorable Sandra N. Peuler, Presiding

Plaintiff/Appellee, Hub Cap Annie, Inc. ("HCA"), respectfully
provides this Brief of Appellant as follows:

STATEMENT OF CASE AND MATERIAL FACTS

1. On August 17, 1994, HCA filed a Complaint. *Record at page 1 ("R. p.1")*.

2. On October 4, 1994, Troy A. Richards was served with the Complaint against Wheel Cover. *R. p.45*.

3. HCA is a Nevada corporation having its principal place of business in Las Vegas, Nevada. *R. pp. 1, 70*.

4. Don is an individual residing in Salt Lake and San Pete Counties, Utah. *R. pp. 1, 70*.

5. At all times material hereto, Wheel Cover Marketing, Inc. ("Wheel Cover") was a Utah corporation having its principal place of business in Salt Lake County, Utah. *R. pp. 1, 70*.

6. Under Utah law, a corporation is required to register with the State of Utah and to maintain a current, accurate statement of some of the directors and officers of a corporation. The records of the State of Utah demonstrate that, at all times material hereto, Troy A. Richards was listed as a director of Wheel Cover. *R. pp. 646, 647, 679, 687-690*.

7. Troy A. Richards ("Richards") was hired by Don to work for Wheel Cover. See pages of Transcript of Deposition of Troy A. Richards for Wheel Cover, pp. 6, 15. Richards managed the day-to-day operations of the business for some time. *Id.* at 17. In addition, Don purchased a company vehicle and registered it in the name of Richards. *Id.* at p. 48. Further, Richards was a signatory

on the bank accounts of Wheel Cover. *Id.* at 18. R. 1364-65, 1411-1418.

8. On or about July 26, 1993, Don filed the Profit Corporation Annual Report (generally "Annual Report") with the State of Utah, Division of Corporations and Commercial Code. In the 1993 Annual Report of Wheel Cover Marketing, Inc., Don designated Troy Richards as a director of the corporation. Further, Don listed himself as the registered agent at the address of 1108 East 3300 South, Salt Lake City, Utah, and as a director, at the address of 1124 East 3300 South, Salt Lake City, Utah.¹ See certified copy of records received pursuant to subpoena directed to the Division of Corporations and Commercial Code. R. p.1439.

9. On or about August 8, 1994, Don filed with the State of Utah, Division of Corporations and Commercial Code, the 1994 Annual Report for Wheel Cover Marketing, Inc. In this Annual Report, Don

¹ These two (2) addresses given by Jensen were not changed in the records of the State of Utah, and were the addresses at which HCA attempted to serve Mr. Jensen individually and as agent for Wheel Cover. As has been shown above, HCA was unsuccessful in locating Jensen at either of these two (2) locations.

again designates Troy Richards as a director of the corporation.²
R. p.1442.

10. Although the records with the State of Utah reflect the addition made by Don of Richards to the Board of Directors for Wheel Cover, there is no deletion or resignation of Richards. At all times material hereto, these records continued to show Richards as director of the corporation. R. p. 1439-43.

11. On August 17, 1994, HCA filed a Complaint with the Third Judicial District Court in and for Salt Lake County, State of Utah, to initiate the above-entitled action. R. p. 1.

12. HCA attempted to serve Don, individually and for Wheel Cover, and James. In fact, Don called, stated that he had heard that HCA was attempting to prosecute this matter and provided information for the potential service of James, although it did not

² Jensen has alleged that he found abuses by Mr. Richards regarding the checking account of Wheel Cover Marketing, Inc. in June 1994, and therefore, was required to close the account. Further, Mr. Jensen alleges that he found numerous other abuses, purported embezzlements and other alleged misconduct late in the summer of 1994 and in July 1994. Thus, he states, and provides a document that only he signed to support this statement, that he removed Troy Richards from his position with the corporation on or about August 5, 1994. Clearly, this is in contrast with the filing of the Annual Report with the State of Utah, on or about August 8, 1994, and which was signed by Jensen and dated July 30, 1994. In addition to this clear question of credibility concerning Jensen's assertions in this matter, whether Troy Richards committed some misconduct is not an issue before the Court. HCA is not required to plead or prove the innocence of Troy Richards; it only is required to prove that he was a director of the corporation. The records of the State of Utah were not changed by Jensen, and Troy Richards was at the time of service, and now, listed as a director of the corporation.

result in service. Don, however, would not assist in service and would not accept service for himself or as the registered agent for Wheel Cover. Further, he did not provide an accurate address with the State of Utah for purposes of serving the registered agent of Wheel Cover. It was almost one year after filing the Complaint that HCA was able to effectuate service on Don. R. p. 1365.

13. Initially after filing the Complaint, HCA sent the Constable with appropriate originals and copies of summons and complaints for service upon Don and Wheel Cover Marketing, Inc., as well as James R. Jensen. Prior to determining to serve and actually serving Troy A. Richards as a director for Wheel Cover Marketing, Inc., HCA made the following service attempts on Don/Wheel Cover Marketing, Inc.:

<u>DATE FOR SERVICE</u>	<u>ADDRESS FOR ATTEMPTED SERVICE</u>
8/22/94	1124 East 3300 South, 1108 East 3300 South and 135 West 3300 South
8/23/94	1124 East 3300 South, 1108 East 3300 South and 135 West 3300 South
8/25/94	1124 East 3300 South, 1108 East 3300 South and 135 West 3300 South
8/30/94	1124 East 3300 South, 1108 East 3300 South and 135 West 3300 South
9/16/94	98 Deer Run Road, # 69, Mount Pleasant, Utah
9/19/94	98 Deer Run Road, # 69, Mount Pleasant, Utah
9/20/94	98 Deer Run Road, # 69, Mount Pleasant, Utah

9/26/94

98 Deer Run Road, # 69, Mount Pleasant,
Utah

R. p. 1366, 1419-30.

14. Accordingly, HCA examined other methods for service of Wheel Cover. HCA followed the allowed method of serving a director of the company, Troy A. Richards. *R. p. 1366.*

15. Richards was served on September 29, 1994. *R. p. 45.*

16. On or about October 10, 1994, Richards, for Wheel Cover, filed an Answer to the Complaint. This Answer did not include a Counterclaim or assert any affirmative defense. It, however, was an intended response to the Complaint. See Transcript of Richards, p. 41. *R. p. 48.* Further, the Answer states that Richards left the employment of Utah Wheels, however, it does not state that he resigned from the board of directors. *Id.*

17. The Answer filed by Wheel Cover did not appear as a normal answer. Accordingly, on or about December 20, 1994, HCA attempted to obtain a Default Judgment against Wheel Cover. When it provided the Default Certificate, the proposed Judgment, the Statement of Attorney Regarding Fees and Costs for Default Judgment, the Request to Enter Default, and the Statement of Attorney for Entry of Default to the Clerk of the Court for acceptance and execution, the Clerk of the Court informed counsel for HCA that an Answer had been filed with the Court. The Default Judgment, therefore, could not be granted. *R. p. 1369.*

18. Subsequently, on February 7, 1995, the deposition of Troy A. Richards and Wheel Cover was taken. *Id.*

19. In the deposition, Richards confirmed that he had filed the Answer with the Court and that it was in response to the Complaint of which he had been served. See Transcript, at p. 41. *R. p. 1410-18.*

20. On May 20, 1995, after nearly one year in attempts, Don was served with the Complaint. *R. p. 68.*

21. On June 12, 1995, Don filed an Answer and Counterclaim to the Complaint. This Answer did not contain a defense concerning lack of personal jurisdiction or insufficiency of process. It was drafted, however, by Michael Jensen, even though Don purported to be a *pro se* defendant. *R. p. 70.*

22. On July 17, 1995, after filing pleadings and sending interrogatories to HCA, Don first asserted the 120 day / insufficiency of process argument in his Verified Amended Answer and Counterclaim. This Amended Answer and Counterclaim were filed more than twenty (20) days after service of the original Answer and Counterclaim. The amendment of the Answer was without leave of Court and was not proper. *R. p. 151.*

23. After the Court dismissed Don's first Counterclaim, HCA filed a second Motion to Dismiss, which also was granted by the Court. *R. pp. 85, 183, 185, 193, 253, 256, 275, 284, 342, 344, 354, 362.*

24. On September 19, 1995, HCA filed its Reply in Support of Plaintiff's Motion to Dismiss Amended Counterclaim and an Affidavit describing and itemizing the fees and costs incurred in responding to the Amended Counterclaim. In its Memoranda, HCA emphasized that the Amendments did not change the defects in the previous Counterclaim. Also, the one new assertion made by Don, consisted of his assertion that Richards had not filed an Answer. The Court previously had determined that Richards had filed an Answer and had refused to grant a default judgment on that basis. Don should have known that his argument was wrong. An easy review of the file would have demonstrated to Don that this Answer had been filed and HCA would not have been required to respond to such assertions. Accordingly, HCA responded that Don was not entitled to an award of sanctions pursuant to Rule 11, however, HCA was entitled to such an award. Thus, HCA filed the Affidavit substantiating and itemizing the attorneys fees and costs that subsequently were awarded by Judge Frederick. *Id.*

25. On October 4, 1996, this Court entered a Minute Entry granting the Motion to Dismiss Amended Counterclaim on the reasons specified in the Memoranda. *R. p. 344.*

26. On October 19, 1996, HCA filed and served a copy of the Order granting the Motion to Dismiss Amended Counterclaim. *R. p. 362.*

27. On October 23, 1995, Don filed a Motion and Memorandum to Strike Alleged Answer of T.A. Richards, Dated October 10, 1994 and

Filed October 21, 1994 ("Motion to Strike"). In the Motion to Strike, Don asserted that he, and only he, could be the agent for Wheel Cover, and that his Answer and Counterclaim should be the pleadings before the Court on behalf of Wheel Cover. This argument arose because the Counterclaim filed by Don was dismissed, in pertinent part, because he had attempted to assert claims that belonged to Wheel Cover. Don was not entitled to assert those claims; he had chosen to make himself unavailable for service of process, then, when HCA was able to obtain service through another means, Don was angry that he could not control the direction of the litigation involving Wheel Cover, the company. R. pp. 367, 370.

28. On or about October 23, 1995, the Court, Honorable Dennis J. Frederick presiding, entered the Order granting the Motion to Dismiss Amended Counterclaim, including the award of attorneys fees and costs for having to respond to the various pleadings and non-meritorious defenses presented by Don. R. p. 362.

29. On November 22, 1995, the Court entered a Minute Entry denying Don's request for hearing on his Motion to Strike; ruling that the answer was for Wheel Cover Marketing, however, it was for a corporate defendant and not signed by an attorney, and therefore, should be stricken; granting default judgment to HCA against Wheel Cover Marketing, Inc.; and declaring that Don must pay the sanctions previously imposed before the Court would consider any further pleadings from the defendant. R. p. 614.

30. On November 27, 1995, Don filed a Request for Clarification, Findings, and for Signed Order of Minute Entry Dated November 22, 1995. R. p. 640.

31. On December 7, 1995, HCA filed a Default Judgment and Order on Defendant's Motion to Strike Alleged Answer to T.A. Richards. R. p. 871.

32. On January 5, 1996, the Court, Honorable Dennis J. Frederick presiding, entered a Minute Entry whereby the Court denied "Defendant Wheel Cover's Objections to Order for Default, Etc." and stated that the "Order on Defendant's Motion to Strike, Etc. and Default Judgment are executed January 5, 1996." R. p. 869.

33. On January 17, 1996, the Honorable Dennis J. Frederick recused himself from this matter because he reported Michael A. Jensen to the Utah State Bar for practicing law in the instant matter prior to being admitted to the Utah Bar on October 17, 1995. R. p. 900, 1357.

34. On January 18, 1996, the Honorable Leslie A. Lewis reassigned this case to the Honorable Sandra N. Peuler. R. p. 905.

35. On or about January 18, 1996, Don filed a Motion for Hearing to Resolve all Pending Motions Before the Court. R. p. 907.

36. On or about January 22, 1996, Don filed a Motion to Compel the Plaintiff to Provide Details of Deposition of Troy Richards. R. p. 967.

37. On January 25, 1996, HCA filed a Memorandum in Support of Motion to Compel Discovery and in Response to Motion for Protective Order. R. p. 983.

38. On or about January 29, 1996, Don filed a Notice to Submit for Decision on Defendant's Motion for Protective Order. R. p. 1059.

39. On or about January 31, 1996, HCA filed a Response to Defendant's Motion to Temporarily Stay Judgments. R. p. 1083.

40. On or about February 2, 1996, Don filed a Notice to Submit for Decision on Defendant's Motion to Temporarily Stay Judgments. R. p. 1143.

41. On or about February 6, 1996, Don filed a Notice to Submit for Decision on Defendant's Motion for Hearing to Resolve all Pending Motions Before the Court. R. p. 1166.

42. On February 23, 1996, the Honorable Sandra N. Peuler entered a Minute Entry. In the Minute Entry, Judge Peuler ruled that she did not have authority to reconsider the Order entered by Judge Frederick on January 5, 1996, and did not decide on any motions filed by Don. Judge Peuler denied the Motion for Protective Order to Bar Depositions Temporarily. Judge Peuler denied a hearing to Resolve all Pending Motions filed by Wheel Cover. Judge Peuler ordered HCA to file information regarding the identity of the court reporter who took the deposition of Troy A. Richards. Judge Peuler denied the Motion to Temporarily Stay Judgments and Request for Hearing filed by Wheel Cover Marketing.

Judge Peuler ordered that a hearing should be set on the Motion to Dismiss the Complaint filed by Wheel Cover Marketing. R. p. 1253.

43. Immediately upon receipt of this Minute Entry, HCA provided a copy of the Certificate from the Court Reporter to Don and sent a new Notice of Deposition scheduling the deposition of Don for March 7, 1996. R. p. 1263.

44. Even though this Court denied the Motion for Protective Order, Don refused and failed to attend the deposition. Michael Jensen sent correspondence to counsel for HCA stating that it was too hard for Don to attend and that Michael Jensen had a trial. HCA requested confirmation information from Michael Jensen for continuance of the deposition date. Michael Jensen refused to provide such information and stated that he was an officer of the court and we would just have to believe him. R. p. 1360.

45. At the hearing before the Utah Supreme Court, on the Petition for Extraordinary Relief, Michael Jensen represented to the Court that this was his first hearing as an attorney. R. p.

46. On or about March 1, 1996, Don filed with this Court a Motion for Clarification and Reconsideration of the Minute Entry dated February 23, 1996. R. p. 1298.

47. On April 23, 1996, the Honorable Sandra N. Peuler, Third District Court Judge, entered a Minute Entry. R. p. 1605.

48. The Minute Entry granted defendants' Motion to Dismiss. R. p. 1605.

49. The Court held that Troy Richards was not a person contemplated under Rule 3 for service of process on a corporation. R. p. 1605.

50. On or about May 3, 1996, defendants filed a Motion to Impose Rule 11 Sanctions Against Brenda L. Flanders. R. p. 1619.

51. On May 13, 1996, plaintiff filed its Response to Defendants' Motion for Rule 11 Sanctions. R. p. 1667.

52. On May 28, 1996, the Court entered a Minute Entry which set aside the Judgment that had been entered against Don Jensen on October 23, 1995, denied defendants' Motion for Rule 11 Sanctions and denied Defendants' Motion for Clarification and Reconsideration. R. p. 1723.

53. Defendants, then, filed a proposed Order that did not conform to the Minute Entry ultimately signed by Judge Peuler. In fact, the Court expressly deleted terms attempted to be included by the defendants as follows:

ORDERED, that the Defendants' Motion to Dismiss is Granted without prejudice because the Plaintiff attempted to serve Defendant Wheel Cover Marketing, Inc. by ~~incorrectly~~ serving Mr. Troy A. Richards, who was not at the time a proper person for service as contemplated by Rule 3, *Utah R. Civ. P.*, ~~and who had advised the Plaintiff on October 21, 1994 that he had no association with the Defendant corporation,~~ and no other Defendant was served within 120 days as required by Rule 3

R. p. 1730, 1734.

54. The Order entered by the Court also vacated the Judgment entered by Judge Fredericks against Wheel Cover Marketing, Inc., but denied the attorneys fees requested by defendants; vacated the

Judgment entered against Don Jensen dated October 23, 1995; denied defendants' Motion for Rule 11 Sanctions against Brenda L. Flanders, and denied defendants' Motion for Clarification and Reconsideration, "in which the Defendants' sought Rule 37 sanctions against Brenda L. Flanders". R. p. 1734.

55. On July 8, 1996, defendants filed a Memorandum of Costs. R. p. 1737.

56. On July 18, 1996, HCA filed its objection to the Memorandum of Costs. R. p. 1742.

57. On August 21, 1996, the Court entered a Minute Entry denying the Motion to Tax Costs. R. p. 1760.

58. On November 22, 1996, the Court entered a Minute Entry specifying as follows:

The Court has received a letter from defendants' counsel, dated October 27, 1996. Counsel has previously been admonished by the Court to refrain from sending letters to the Court. However, in an attempt to prevent further needless pleadings which serve only to increase costs to both parties, and since the Court has previously ruled on the issue raised by counsel's letter, the Court will not request further Motions to be filed in this matter.

The matter of concern to defendants' counsel is his Memorandum of Costs filed in this action on July 8, 1996. Plaintiff filed an objection to defendants' Memorandum, and a Motion to Tax. The ruling of the Court was to deny defendants' costs set forth in his Verified Memorandum. In its earlier ruling, the Court inadvertently referred to defendants' Motion as one to tax costs. That was, pursuant to Rule 54, an inappropriate designation, as it was the plaintiff who sought to have the costs taxed. However, the prior Minute Entries are clear in their denial of defendants' Motion for costs.

**ISSUES PRESENTED ON APPEAL
AND STANDARD OF REVIEW**

1. **Issue.** Whether the trial court correctly denied Rule 37 sanctions against Hub Cap Annie, Inc. and its attorney, Brenda L. Flanders, particularly when defendants had not sent formal discovery requesting the information sought by the Motion to Compel?

Standard of Review. The imposition of sanctions is discretionary with the trial court. First, a formal discovery request must be made and that request must have not been complied with. Because the issue of sanctions is discretionary with the trial court, the decision of the trial judge will not be reversed absent an abuse of that discretion and such abuse must be clearly shown. *Utah Dot v. Osguthorpe*, 892 P.2d 4 (Utah 1995); *Darrington v. Wade*, 812 P.2d 452 (Utah Ct. App. 1991); *Schoney v. Memorial Estates, Inc.*, 790 P.2d 584 (Ut. Ct. App. 1990), cert. denied, 804 P.2d 1232 (1990); 8A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* 2291 (1994) (discussing the federal rule).

2. **Issue.** Whether the trial court correctly denied defendants' Motion for Rule 11 Sanctions against Brenda L. Flanders when she demonstrated on a constant basis that thorough research and investigation had been conducted concerning the responses to Defendants'/Appellants' motions to dismiss?

Standard of Review. "When reviewing a trial court's rule 11 determination, we review the trial court's findings of fact under a clearly erroneous standard, the trial court's conclusion that rule 11 was violated under a correction of error standard, and the trial court's determination of the type and amount of sanction to be imposed under an abuse of discretion standard. *Barnard v. Sutliff*, 846 P.2d 1229, 1235 (Utah 1992). " *Schoney v. Memorial Estates, Inc., et al.*, 863 P.2d 59 (Ut. Ct. App. 1993).

"Rule 11 requires an attorney to make a reasonable inquiry to assure that the motion is "well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose." Rule 11, *Utah R. Civ. P. Schoney*, 863 P.2d 59.

3. **Issue.** Whether the trial court correctly denied the costs requested by defendants?

Standard of Review. This issue is reviewed under an abuse of discretion standard. *Morgan v. Morgan*, 795 P.2d 684, 686 (Utah Ct. App. 1990).

STATUTORY PROVISIONS

Rule 4(e), *Utah Rules of Civil Procedure*, provides, in pertinent part, as follows:

(e) **Personal service.** Personal service shall be made as follows:

. . . .
(5) Upon any corporation, not herein otherwise provided for, upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy thereof to an officer, a managing or general agent, or other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

Rule 11, *Utah Rules of Civil Procedure*, provides, in pertinent part, that

[t]he signature of an attorney or party constitutes a certification by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Rule 12(f), *Utah Rules of Civil Procedure*, provides in pertinent part:

Motion to strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty days after the service of the pleading upon him, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

Rule 15(a), *Utah Rules of Civil Procedure*, provides, in relevant part, as follows:

[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

Rule 37, *Utah Rules of Civil Procedure*, provides, in pertinent part, as follows:

(a) **Motion for order compelling discovery.** a party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(2) **Motion.** If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request.

Rule 54(d), *Utah Rules of Civil Procedure*, provides as follows:

(d) **To whom awarded.** Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs . .

SUMMARY OF ARGUMENT

The trial court correctly denied the request for Rule 11 sanctions against Brenda L. Flanders. Rule 11 simply requires that an attorney conduct sufficient legal research and factual inquiry to believe that there is a meritorious basis for the assertions made in pleadings. The record is replete with the investigation conducted by Flanders. The denial of the motion for sanctions is supported by the record and should be affirmed by this Court.

Initially, Rule 37 sanctions are not available to defendants. Rule 37 applies to a failure to comply with formal discovery. There was no formal request for the material information. Further, the Court has discretion to determine that sanctions are not appropriate. The trial court's determination is supported by the record and should be affirmed.

Rule 54(d) does not mandate an award of costs to defendants. In fact, the Rule expressly provides that the Court can deny such an award. In this case, the Court denied the costs requested by defendants and there is support in the record for such denial. Consequently, the trial court's decision should be affirmed.

ARGUMENT I

THIS COURT CORRECTLY DENIED RULE 11 SANCTIONS AGAINST BRENDA L. FLANDERS

Rule 11, *Utah Rules of Civil Procedure*, provides, in pertinent part, that

"[t]he signature of an attorney or party constitutes a certification by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

Brenda L. Flanders ("Flanders") consistently has made assertions in legal memoranda and oral arguments that are well grounded in fact and she reasonably has inquired into the existing law regarding the issues raised in this litigation. Flanders has verified information obtained from her client, HCA, has conducted discovery and has researched relevant case law and statutes governing the issues in this case. Flanders' inquiry was reasonable under the circumstances. See *Taylor v. Taylor*, 770 P.2d 163, 170 (Utah Ct. App. 1989). The trial court correctly determined that Flanders had not violated Rule 11, *Utah Rules of Civil Procedure*, and therefore, denied defendants' request for sanctions.

ARGUMENT II

THE MOTION TO STRIKE AMENDED ANSWER DID NOT CONSTITUTE A RULE 11 VIOLATION

Plaintiff relied on Rules 12 and 15 of the *Utah Rules of Civil Procedure* in its Motion to Strike Amended Answer and Counterclaim. The arguments used were based on legal and factual foundation. Rule 12(f), *Utah Rules of Civil Procedure*, provides in pertinent part:

Motion to strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty days after the service of the pleading upon him, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(Emphasis added).

Further, Rule 15(a), *Utah Rules of Civil Procedure*, supports the assertion that Don could not amend his Answer and Counterclaim without leave of court. Rule 15(a) provides, in relevant part, as follows:

[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

The Motion filed by the plaintiff was a Motion to Strike both the Amended Answer and the Counterclaim. The Amended Answer did not require a responsive pleading and Don filed his Amended Answer more than twenty (20) days after service of the original Answer. Consequently, *Heritage Bank & Trust v. Landon*, 770 P.2d 1009, 1010 (Utah Ct. App. 1989), is not applicable to the legitimacy of the Motion to Strike in reference to the Amended Answer. The Motion to Strike the Amended Answer was legitimate.

In addition, as seen above, Rule 12(f), *Utah Rules of Civil Procedure*, specifically provides for the filing of a Motion to Strike for "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter". The Amended Answer and Counterclaim did not contain any new substantive matter.¹ Plaintiff legitimately cited Rule 12(f) as support for the Motion to Strike Amended Answer and Counterclaim. The Court clearly had the authority to strike the pleading pursuant to Rule 12(f), *Utah Rules of Civil Procedure*, and the *Heritage Case*, 770 P.2d 1009, does not preclude the filing of a Motion to Strike based on Rule 12(f).

Certainly, there was a legal and factual basis for the Motion to Strike Amended Answer filed by the Plaintiff. "It is enough that the attorney's reading of the law is a reasonable one. Thus, once an attorney forms a reasonable opinion after conducting appropriate research, the mere fact that the attorney's view of the law was wrong cannot support a finding of a rule 11 violation."

Barnard V. Sutliff, 846 P.2d 1229 (Utah 1992). Rule 11, *Utah Rules of Civil Procedure*, does not provide for an award of sanctions based on the filing of the Motion to Strike. In addition, Don asserts that he incurred \$20,000.00 in attorneys fees and costs as a consequence of the Rule 11 violation, however, Michael Jensen did not enter an appearance until October 20, 1995, and the Motion to Strike was filed on July 31, 1995.

ARGUMENT III

THE ASSERTION THAT RICHARDS WAS A DIRECTOR OF WHEEL COVER MARKETING, INC. FOR PURPOSES OF SERVICE OF PROCESS WAS BASED UPON SUBSTANTIAL INVESTIGATION AND INQUIRY

Defendants asserted that sanctions should be ordered against Flanders because of her contention that Richards was a proper agent for service of process. HCA, through its counsel, conducted substantial investigation and inquiry into the relevant facts and law. It is true that Judge Peuler ultimately ruled against HCA, however, this is not the standard for determining Rule 11 sanctions. *See Barnard v. Sutliff*, 846 P.2d 1229 (Utah 1992).

In this case, HCA, through its counsel Flanders, asserted that defendant, Wheel Cover, properly was served with the Complaint in this matter. Don avoided service of the Complaint; HCA attempted service on him individually and as registered agent for the corporation. Don knew that service was being attempted. He had the audacity to contact Flanders and to provide information concerning service of James Jensen, however, he would not provide his location for his service. HCA attempted to serve him on

numerous occasions. Rule 4, *Utah Rules of Civil Procedure*, allows and specifically provides for service upon an agent of the corporation. Troy Richards continued to be listed with the State of Utah by Wheel Cover and Don Jensen as a director for Wheel Cover.

HCA found and provided to the court numerous facts to support Richards' position as a director of the company. Most importantly, Don himself filed the Annual Reports with the State of Utah wherein Richards was declared to be a director. Further, even though Don filed the Articles of Dissolution, he did not remove Richards as a director of the corporation in the records maintained with the State of Utah. Don, clearly, was aware that Richards was listed as a director because he affirmatively prepared that notification and filed it with the State of Utah. Section 16-10a-1405, *Utah Code Annotated*, Effect of dissolution, provides in pertinent part, as follows:

(1) A dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs, . . .

. . . .

(2) Dissolution of a corporation does not:

. . . .

(c) subject its directors or officers to standards of conduct different from those prescribed in Part 8;

(d) change:

(i) quorum or voting requirements for its board of directors or shareholders;

(ii) provisions for selection, resignation, or removal of its directors or officers or both;
or

- (iii) provisions for amending its bylaws or its articles of incorporation;
- (e) prevent commencement of a proceeding by or against the corporation in its corporate name;
- (f) abate or suspend a proceeding pending by or against the corporation on the effective date of dissolution; or
- (g) terminate the authority of the registered agent of the corporation.

Don did not remove Richards as a director from the records maintained with the State of Utah until recently. Richards was a director, and therefore, an agent of the corporation for purposes of service of process. HCA previously had requested that default be entered against Wheel Cover, however, the Court refused to enter default on the basis that the "Company" had filed a responsive pleading to the Complaint filed by HCA.

Rule 8, *Utah Rules of Civil Procedure*, requires nothing more than that the respondent attempt to meet the allegations of the Complaint as to that specific defendant. Although Richards' Answer was not technical in nature, he did attempt to meet the allegations in the Complaint, and did so as adequately as he was able. In fact, he succinctly stated that he believed Wheel Cover was a legitimate business, had operated in a legitimate fashion, was owned by Don to his knowledge and responded to accusations concerning his knowledge of the use of the franchised property of HCA.

Utah law allows for service on a director of a corporation. Section 16-10a-504(3), *Utah Code Annotated*, specifically states

that "[t]his section does not prescribe the only means, or necessarily the required means, of serving a corporation."

Further, Rule 4(e), *Utah Rules of Civil Procedure*, provides, in pertinent part, as follows:

(e) **Personal service.** Personal service shall be made as follows:

(5) Upon any corporation, not herein otherwise provided for, upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy thereof to an officer, a managing or general agent, or other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

By definition, a director is an "officer, a managing or general agent" and is an agent of the corporation for purposes of service of process. A "director" is "[o]ne who, or that which directs; as one who directs or regulates, guides or orders; a manager or superintendent, or a chief administrative official." *Black's Law Dictionary*, p. 460 (6th ed. 1990). Further, a director is a person "appointed or elected according to law, authorized to manage and direct the affairs of a corporation or company." *Id.* Don has admitted that he was in control of the business and was the majority stockholder. If he desired a change in the corporate records that had been filed with the State of Utah, he could have made such a change. Not only did Don not file a change with the State of Utah concerning the members of the Board of Directors, he filed a renewal of the corporate information after he allegedly

fired Richards that listed Richards as a director and he intentionally avoided service concerning the claims against the corporation.

Richards was a director of Wheel Cover. At least, that is the information provided by the records contained by the State of Utah, which records were filed by Don.

Flanders made reasonable inquiry of the Answer of Troy Richards and based her legal assertions on relevant statutory law of the State of Utah as stated in the preceding paragraphs.

Flanders did not intentionally ignore the Articles of Dissolution. The Complaint was filed on August 17, 1994, the Articles of Dissolution were filed on September 14, 1994. Flanders has cited case law and the Utah Corporate Code regarding the responsibility of directors in numerous memoranda. Defendants' assertion that Flanders has not cited any rule, statute, or case law regarding the issues involved is a flagrant misstatement. Further, Don's suggestion that his statement in his pleadings that Richards had been fired somehow negates all of the investigation conducted by Flanders is without merit. Termination of an employee does not remove that person as a director. In addition, Don's assertion assumes that there has not been factual controversy and numerous assertions on his part that cannot simply be assumed as true. Finally, his statement is one part of the investigation conducted by Flanders, which investigation lead to numerous facts supporting the argument that Richards was a director for purposes

of service of process, and that investigation was sufficient to satisfy Rule 11 requirements.

ARGUMENT IV

FLANDERS DID NOT VIOLATE RULE 11 BY ASSERTING THAT DEFENDANTS HAD A DUTY TO MAKE CHANGES IN THE UTAH STATE CORPORATE RECORDS

Defendants contend that Flanders violated Rule 11, *Utah Rules of Civil Procedure*, by asserting that a corporation has a duty to notify the State of Utah of changes in its officers and directors. Again, Defendants make a grave misrepresentation to the Court. Flanders did not make this allegation. Flanders asserted that under Utah law, a corporation is required to register with the State of Utah and to maintain a current, accurate statement of some of the directors and officers of a corporation. Further, Flanders contended that the records of the State of Utah demonstrated that Troy Richards was listed as a director of Wheel Cover, and, that if Don desired a change in the corporate records he should have filed the change with the State of Utah. See Plaintiff's Response to Motion to Strike Answer, pp. 2, 17; Plaintiff's Response to Motion for Clarification and Reconsideration, pp. 7, 25-26; and Plaintiff's Response to All Motions Filed by Don C. Jensen that Remain Pending Before this Court Except the Motion for Extension to File Appeal, p. 5.

Flanders did not violate Rule 11, *Utah Rules of Civil Procedure*. Unfortunately, defendants, again, are attempting to

confuse the record by misrepresenting what was cited in the various memoranda.

ARGUMENT V

FLANDERS DID NOT VIOLATE RULE 11 WITH HER ASSERTION THAT THE REPORTERS' CERTIFICATE FOR TROY RICHARDS DEPOSITION WAS IN THE FILE

The Court Reporter from Rocky Mountain Reporting Service mailed to Flanders a copy of the Reporter's Certificate concerning Richards deposition, which certificate identified the pertinent information concerning the deposition. The Court Reporter stated in the Certificate, that said Certificate had been mailed to the Court on June 21, 1995. In addition, when questioned, Flanders contacted the Court Reporting Agency and obtained an Affidavit concerning the filing of the Certificate with the Court. Flanders certainly conducted sufficient inquiry to assert that the Certificate was in the Court file.

In addition, Flanders told Jensen that the Reporting Company was Rocky Mountain. Flanders did not violate Rule 11.

Also, when the Court entered its Minute Entry concerning numerous items, Flanders immediately complied with this Court's Ruling regarding the provision of the requested information, even though Flanders had provided this information several times. Again, Flanders has not committed a Rule 11 violation. On February 27, 1996, plaintiff filed a Notice of Compliance with the Order. Defendants continue to misrepresent that this information never was conveyed to them. Plaintiff has provided this information in

letters and legal memoranda that is in the Court's file. Flanders did not violate Rule 11, *Utah Rules of Civil Procedure*.

ARGUMENT VI

FLANDERS DID NOT VIOLATE RULE 11 BY ASSERTING THAT THE COURT PREVIOUSLY RULED ON SERVICE AND ATTORNEYS FEES

Defendants continue to allege that Flanders did not cite to the record and that the Court has not determined that Wheel Cover was sufficiently served and that the Court did not grant plaintiff sanctions. On October 23, 1995, the Honorable J. Dennis Frederick, Third District Court Judge, executed an Order on Plaintiff's Motion to Dismiss Amended Counterclaim. This Order granted the Motion to Dismiss Amended Counterclaim which argued that Richards was the proper agent to accept service for Wheel Cover Marketing, Inc. In addition, HCA requested that sanctions be awarded in favor of HCA for having to respond to the Amended Counterclaim that was filed without authority, which sanctions were granted to HCA and against Don, by the Court in the amount of \$1,156.32. Flanders has relied on the Court's Order and has not randomly and baselessly made frivolous arguments. The arguments have been based on merit. Flanders has not violated Rule 11, *Utah Rules of Civil Procedure*.

In addition, defendants previously have requested fees against plaintiff and Flanders based on Rule 11, and specifically made this request in their Motion to Dismiss Complaint. In the Minute Entry, the Court ruled that "Defendants' Motion for Attorney's Fees is denied."

ARGUMENT VII

THE TRIAL COURT CORRECTLY DENIED DEFENDANTS' REQUESTS FOR RULE 37 SANCTIONS

Rule 37, *Utah Rules of Civil Procedure*, expressly applies to a party's failure to permit or comply with formal discovery. Don never requested the information concerning Richards Deposition by formal discovery. Consequently, defendants were not entitled to sanctions.

Additionally, Rule 37(a)(4) dictates that an award of fees and costs should not be granted if the court finds that the opposition to the Motion was substantially justified or that such an award would be unjust. HCA never opposed providing the information to defendants.

In fact, HCA had previously provided the information requested by Don. This information was provided in both verbal and written form. Further, an affidavit was filed with the trial court wherein the Court Reporting Agency, Rocky Mountain, certified that a copy of the Certificate of Transcript was mailed to the Clerk of the Court.

HCA previously informed Don that Rocky Mountain conducted the deposition of Richards. This was and is accurate information. A motion to compel was not required.

Finally, HCA immediately sent to defendants' counsel a copy of the Certificate provided by the Court reporter upon receipt of the Court's Minute Entry.

An award of fees pursuant to Rule 37, *Utah Rules of Civil Procedure*, was not appropriate because Rule 37 is not applicable to this matter, the defendants were not required to file the Motion because the information previously had been provided and such an award would be unjust under the circumstances of this case. The decision of the trial court to deny the request for sanctions was not an abuse of discretion or a legal error. Certainly, the ruling should be affirmed.

ARGUMENT VIII

THE TRIAL COURT CORRECTLY DENIED THE COSTS REQUESTED BY DEFENDANTS

Rule 54(d), *Utah Rules of Civil Procedure*, provides that costs shall be allowed to the prevailing party "unless the court otherwise directs". The trial court clearly has discretion to deny any award of costs. In addition, there was substantial reason to deny the costs requested by the defendants in their Memorandum.

First, the defendants must prove that the costs were necessarily incurred in the proceeding. Jensen has listed two costs for which they seek reimbursement. The first is the cost for filing the Counterclaim and requesting a jury. The filing of the counterclaim and the request for a jury were not necessary in this case. The costs related thereto should not be taxed. The Counterclaim was dismissed by the Court. Further, the relief granted was not pursuant to the Counterclaim, but simply was a

dismissal of the Complaint pursuant to a Motion to Dismiss. The filing fee, therefore, should not be required to be reimbursed by the HCA.

As to the Jury Fees, certainly, these were not necessarily incurred in this case. No jury was utilized. Again, the substance of the case was not visited by the Court. The Complaint was dismissed based upon a ruling that service was not adequate. The Motion to Dismiss could have been filed and determined prior to the filing of any Counterclaim or request for Jury. The Answer filed by Don Jensen apparently did not submit the defendants to the jurisdiction of the Court. Accordingly, there was no necessity of filing the Answer and Counterclaim. The Counterclaim filing fees and Jury fees, therefore, were not necessarily incurred in this case and HCA should not be required to reimburse the defendants for these costs.

Next, defendants request reimbursement for the costs of obtaining a copy of the deposition of Troy Richards. The Court ruled that service was improper based upon the "Answer" that was filed by Troy Richards. The Court held that "Richards was not a person contemplated under Rule 3 for service on a corporation. Regardless of whether plaintiff had prior knowledge of Richards' disassociation with the defendant corporation, plaintiff was so advised by Richards' October 21, 1994 filing." The October 21, 1994 filing was in the Court file. It was not necessary for the defendants to expend costs for the deposition of Troy Richards to

obtain the current result. The deposition was not utilized in the Court's determination. Consequently, the costs of obtaining the deposition transcript should not have been ordered to be reimbursed by HCA.

The Motion to Dismiss could have been and was granted without consideration of the Answer and Counterclaim filed by Jensen, without and prior to any involvement with a jury and absent use of the deposition transcript of Troy Richards. None of these costs were necessarily incurred in this matter. The trial court was within its discretion to deny the request for costs made by defendants. The order should be affirmed.

CONCLUSION

Flanders did not violate Rule 11, *Utah Rules of Civil Procedure*. Further, the fees requested by Jensen were not itemized, and were not shown to have been incurred as any kind of a result of any violation of Rule 11. Although ultimately the court ruled against the arguments asserted by HCA through its counsel, Flanders, the record is replete of information concerning the legal research and factual investigation conducted to substantiate the allegations made in the pleadings. Jensen was not entitled to an award of sanctions based upon Rule 11.

Rule 37, *Utah Rules of Civil Procedure*, applies to the failure to comply with formal discovery requests. There was no formal discovery request made in this case concerning the provision of

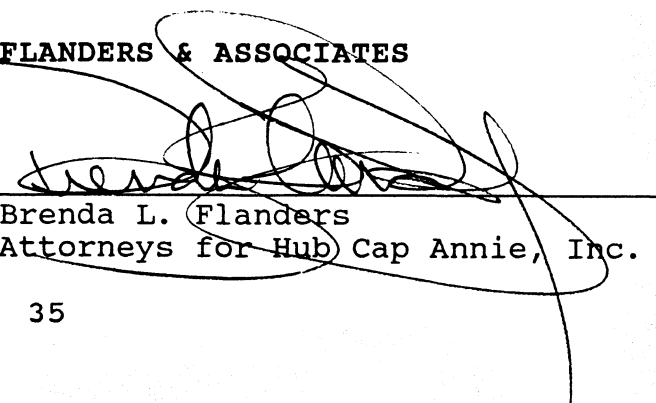
information regarding the Richards Deposition. In addition, there certainly was information that the information had been provided. Finally, Flanders immediately complied with the Order of the Court and provided the information, again. The ruling of the trial court is substantiated by the record in this matter and should be affirmed.

Rule 54(d), *Utah Rules of Civil Procedure*, does not mandate the award of costs to defendants. The Rule specifically allows the trial court to deny such an award. This is a case in which costs should not be awarded. HCA has simply pursued this case in accordance with the on-going rulings of the Third Judicial District Court. The costs sought by defendants were not necessarily incurred by defendants in this case. The denial of an award of those costs is supported by the record and should be affirmed.

WHEREFORE, HCA respectfully requests that this Court affirm the trial court's determination to deny the Rule 11 sanctions, the Rule 37 sanctions and the request for costs, and grant such further relief as the Court deems proper.

DATED this 13th day of June, 1997.

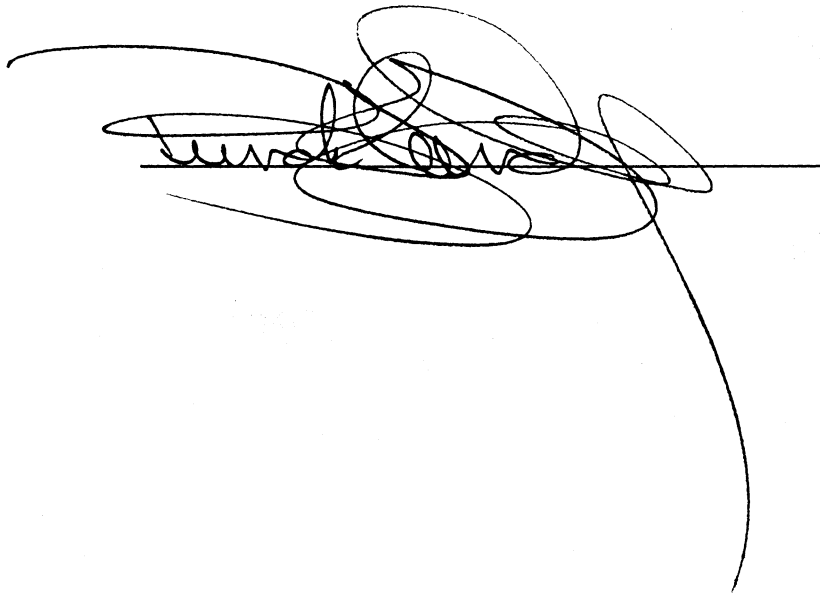
FLANDERS & ASSOCIATES


Brenda L. Flanders
Attorneys for Hub Cap Annie, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of June, 1997, I served two copies of the forgoing Brief of Appellee on the following, by depositing copies thereof in the United States mail, postage prepaid, addressed as follows:

Michael A. Jensen
Attorney at Law
First Interstate Plaza, Ninth Floor
Salt Lake City, Utah 84101-1655

A handwritten signature in black ink, appearing to read "Michael A. Jensen", is written over a horizontal line. The signature is stylized with loops and a long, sweeping underline that extends to the right.